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Note: Due to legislative changes, references to "the PCO" should now read "the Superintendent of Financial Services.

Surplus Remaining in Wound-up Plans

According to the *Pension Benefits Act* (the "PBA") a pension plan is not wound up until **all** plan assets have been distributed.

When a plan is being wound up, the administrator has a fiduciary obligation to ensure that any remaining surplus is paid out in an expeditious manner. In doing so, the administrator must ensure that any interests the beneficiaries or employer have in the surplus are assessed and protected. To satisfy its fiduciary duty, the administrator should obtain all advice necessary to resolve any surplus entitlement issues.

In determining surplus entitlement, a review should be made of all relevant plan and trust documents that have existed since the plan's inception. This review should include amendments, provisions regarding the power to amend, relevant predecessor plans, employee booklets, and the like.

If the administrator determines that the plan beneficiaries are entitled to the surplus, a supplementary wind up report should be filed, outlining the method by which the surplus will be distributed to the plan beneficiaries. If the administrator determines that the employer is entitled to the surplus, the administrator should advise the employer to apply to the PCO for its consent to distribute the surplus.

Should the administrator believe, after having obtained appropriate advice, that the matter of surplus entitlement is not likely to be readily resolved, appropriate legal steps should be taken to clarify the situation so that the surplus can be paid out.

The Superintendent is writing to administrators of pension plans in which the wind up has commenced but where the surplus remains undistributed. The purpose is to inform administrators that a proposed plan for the distribution of **all** surplus and a timetable for completion of the wind up is required by the Superintendent within 30 days of notification through the Superintendent's letter.

If the Superintendent is not informed of an administrator's proposed plan and timetable for implementation within the 30 day period, the Superintendent will take appropriate action (and make orders as required under section 87 of the PBA) to ensure that the surplus is distributed in order to permit the plan to be wound up. Should the administrator fail to act, the Superintendent may replace the administrator and appoint an independent administrator (subsection 71(1) of the PBA) with instructions to ensure that:

- any interest the beneficiaries or employer has in the surplus is fully assessed;
- entitlement to surplus is resolved forthwith; and
- appropriate steps are taken to pay out the surplus.

Administrators should be aware that other remedies exist under the PBA that may be exercised should the situation warrant.